DeGraba at ¶ 125 Indeed, for the reasons discussed above, a move to bill-and-keep for all traffic would produce significant gains for net consumer welfare. Bill-and-keep would reduce the significant costs of regulatory uncertainty and inefficient arbitrage, and a significant portion of those savings would be passed on to consumers in the form of lower retail rates within the telecommunications industry as a whole.[18]

The "consumer welfare" concerns raised about the application of bill-and-keep to access traffic are therefore not concerns about consumer welfare in the aggregate, which bill-and-keep could only enhance. Instead, the concern is that, as rates for most end users go down, rates for other end users would rise to meet the actual costs of serving them (in the absence of an explicit universal service response) That is because bill-and-keep would eliminate current implicit subsidy mechanisms that shield certain end users from bearing responsibility for the unusually high costs involved in connecting them to the network

The existing access charge regime embodies two principal subsidy mechanisms. First, current access charges as a whole may exceed the aggregate costs of providing the specific access services with which they are associated, thereby permitting incumbent LECs to offer lower rates for basic local service.[19] Second, and more important in this

[18] Although some critics suggest that consumers would find it hard to read their bills after a switch to bill-and-keep (*e.g.*, AT&T Comments 6, 33), those concerns are a sham. At worst, consumers would have to pay two separate sets of charges: those that cover the services offered by an end user's LEC, and those that cover the services offered by an end user's IXC. But that, of course, is the case today. The only difference is that certain costs that used to be associated with the IXC would now be associated with the LEC. There is nothing particularly "confusing" about that outcome, and in any event all carriers would have an incentive to find market-oriented ways to reduce any confusion.

[19] The ***CALLS Order*** purported to eliminate that implicit subsidy mechanism for price-cap LECs on the interstate side of the ledger. ***But see Texas Office of Pub Util. Counsel,***

context, 47 U.S C. § 254(g) requires an IXC – to the extent that it must pay access charges – to recover them not from the specific end users that cause them to be incurred, but from the IXC's national subscriber base. That national averaging requirement forces an IXC's end users in low-cost areas to pay significantly above-cost rates for conventional long-distance calls so that end users in high-cost areas may pay artificially low rates. Bill-and-keep would largely eliminate this subsidy mechanism because, by requiring each LEC to recover its network costs from its own end users, it would remove access charges from the scope of the costs that are subject to the national averaging requirement.

Although including access charges within the scope of that requirement may have made sense as a transitional measure in the wake of the 1996 Act, it would be inappropriate on two levels to rely on that mechanism as a long-term solution to universal service needs. First, it is implicit rather than explicit and, as such, is irreconcilable with the new universal service mandate of section 254. Second, the geographical averaging mechanism is not at all competitively neutral: it places the subsidy burden not on telecommunications providers as a whole, but on providers of a limited category of telecommunications services (conventional long-distance services). That, too, cuts against the grain of section 254, which emphasizes the twin needs, in a competitive marketplace, to make universal service mechanisms fully explicit and to spread the

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265 F.3d at 327-28 (vacating that portion of ***CALLS Order***). Moving to bill-and-keep for access traffic would not by itself necessarily eliminate ***this*** form of implicit subsidy where it persists, because regulators could theoretically choose to retain the subsidy mechanism in the form of higher rates that ILECs charge end users directly (rather than indirectly through higher access rates charged to those end users' IXCs).

contribution obligation as broadly as possible among providers of telecommunications generally.

In short, the geographic averaging mechanism that bill-and-keep's opponents wish to preserve is an anachronism and should be eliminated. Qwest understands that, by eliminating that implicit subsidy mechanism, bill-and-keep would require a significant expansion of current universal service mechanisms. In particular, it would require appropriate increases in the level of explicit contributions to the universal service fund. But that, again, is the necessary by-product of the reforms required by section 254.

Along these lines, there is no merit to suggestions that, by moving to bill-and-keep for access traffic, the Commission would somehow ***violate*** section 254(g). *Cf.* Focal Comments 42. By its terms, that provision merely requires "providers of interexchange telecommunications services" to average their rates among their entire subscriber base; it does not require such providers to pay access charges to ILECs. Indeed, relieving IXCs of the need to subject access charges to that national averaging requirement is the only way to satisfy the larger emphasis in section 254 on explicit and competitively neutral funding mechanisms. If anything, therefore, bill-and-keep is more consistent than the current access charge regime with the universal service principles of section 254. A few parties also seek to revive the moribund argument that a separate subprovision within section 254 – 47 U.S.C. § 254(k) – must be interpreted to require IXCs, rather than end users, to bear the costs of access. That position, which has no foundation in either the letter or the objectives of section 254, has now been squarely rejected not just by the Commission, but also by two courts of appeals. ***See Texas Office*** *of Pub. Util. Counsel*, 265 F 3d at 323-24, *Southwestern Bell*, 153 F.3d at 559. The Commission should reject it here as well.

Finally, adoption of bill-and-keep for interexchange traffic will require the recovery directly from end users of certain network costs that had previously been recovered indirectly from end users through access charges. The Commission should permit significant flexibility in the recovery of those costs As discussed in Qwest's opening comments (and above), one of the principal benefits of bill-and-keep is that, for the first time, it would make it feasible to employ flat-rated recovery of the costs of terminating access where that is more efficient than recovery through usage-sensitive charges. Any decision to adopt bill-and-keep should be accompanied by sufficient flexibility in end user rates that those rate structure efficiencies can be achieved.[20]

IV. The Commission has legal authority to impose bill-and-keep for most traffic.

The parties' divergent interpretations of the statutory provisions addressing intercarrier compensation rates confirm that those provisions, like a number of other

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[20] Because adopting bill-and-keep for access traffic would require significant reform of existing subsidy mechanisms, it would be appropriate to solicit the views of the Joint Board, just as the Commission might wish to do in response to the Tenth Circuit's recent decision invalidating the Ninth Report and Order *See generally* 47 U.S.C. §§ 254(a), 410(a) Nonetheless, to avoid undue delay, the Commission should enforce a strict timetable for the presentation of the Joint Board's report and recommendation. A Joint Board could also recommend any adjustments to the current separations rules that might be appropriate to accommodate bill-and-keep. *See* 47 U.S.C § 410(c). Although NECA hints that bill-and-keep would require significant changes to those separations rules, it is unclear why that would be so. As NECA acknowledges, bill-and-keep addresses how network costs are recovered (*i.e.*, from end users or from other carriers), not how they are allocated between jurisdictions. *See* NECA Comments 13. Of course, this Commission and its state counterparts would need to continue ensuring that ILECs receive a compensatory rate of return on both the interstate and intrastate sides of the ledger. *See generally Smith v Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). But there is no apparent reason why, after adoption of bill-and-keep, that requirement could not be met within the existing separations regime

provisions in the 1996 Act, "[are] in many important respects a model of ambiguity or indeed even self-contradiction " *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). In these circumstances, where there is no obvious way to reconcile the various strands in the statutory text, the result is a rule of considerable deference to the Commission. As the Supreme Court has observed, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id* The Commission has broad discretion to resolve those ambiguities to pursue what, in light of its institutional expertise, it concludes is in the public interest. ***See id.***

A. The Commission has authority to impose bill-and-keep for traffic covered by section 251(b)(5).

Opponents of bill-and-keep mistakenly treat the language of section 252(d)(2) as though it reflected a deliberate congressional choice as between CPNP and bill-and-keep for particular categories of traffic. *E.g.*, AT&T Comments 36-41. That provision does no such thing; in particular, it nowhere limits the reach of the bill-and-keep savings clause to cases of balanced traffic.[21] Instead, Congress gave the FCC and the state commissions a choice· either to elect "arrangement[s] that waive mutual recovery (such as bill-and-keep arrangements)" or to elect a truly cost-based CPNP regime ***See*** Qwest

[21] AT&T contends (Comments 36) that section 252(d)(2)(B)(i) "clarifies that 'arrangements that waive recovery (such as bill-and-keep arrangements)'" are permissible only "*if* they 'afford the mutual recovery of costs through the offsetting of reciprocal obligations.'" The first of those statutory quotations by AT&T omits a word in the bill-and-keep savings clause that clause explicitly preserves "arrangements that waive *mutual* recovery (such as bill-and-keep arrangements)." AT&T thus nonsensically contends that the savings clause preserves "arrangements that ***waive*** mutual recovery" of costs only if those arrangements also (impossibly) "*afford* the mutual recovery of costs." 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added). The Commission is entitled to assume that Congress meant to make sense, and any ambiguity in this statutory language should be resolved in favor of an appropriately robust construction of this savings clause.

Opening Comments 43. What section 252(d)(2) precludes is the imposition of a non-cost-based scheme of compelled payments between carriers. But section 252(d)(2) does not constrain the Commission's choice of bill-and-keep if it determines, as it should here, that it would better serve the public interest than a purportedly cost-based CPNP alternative.

In any event, even if the bill-and-keep savings clause were ignored, section 252(d)(2)(A), standing alone, would not preclude bill-and-keep arrangements, because at most it would require regulators to permit recovery of the "additional costs" of transport and termination. ***See*** Qwest Opening Comments 42. That specialized term is reasonably construed to limit any intercarrier payments to the short-term marginal costs (effectively zero) of transporting and terminating each call. *Id.* Contrary to WorldCom's suggestion (Comments 19), determining that the "additional costs" of transport and termination are zero for these purposes does not somehow imply that the ***total element long run*** incremental cost of switching and transport is zero for purposes of setting the rate that CLECs must pay when leasing an ILEC's network elements. TELRIC was adopted under a different statutory standard: the UNE cost standard of section 252(d)(1). The Commission's implementation of that provision in that context has no logical bearing on its authority to impose bill-and-keep as an appropriate intercarrier compensation mechanism.

Citing the Supreme Court's 1999 decision in ***Iowa Utilities Board,*** Focal suggests that, in adopting bill-and-keep for traffic covered by section 251(b)(5), the Commission would cross a perceived jurisdictional line dividing (1) the FCC's authority to issue general methodological rules from (2) the states' power to set particular rates. Focal

Comments 32-33, *see generally Iowa Utilities **Bd.***, 525 **U.S.** at **384.** This argument is without merit Bill-and-keep is a methodology, not a "rate." The Commission has no less authority to preclude intercarrier termination charges for all traffic than to preclude it for balanced traffic – or, for that matter, to preclude one carrier from charging another for the cost of originating a local call (as, indeed, it has already done, *see* 47 C.F.R. § 51.703(b)). More generally, the Supreme Court has made abundantly clear that the Commission has plenary authority to resolve broad methodological issues of national importance to the industry. The issue before the Commission here is as general and nationally significant as they come: whether the rationalized intercarrier compensation regime for the 21st century will be bill-and-keep or some version of **CPNP.** The Commission can and should resolve that issue in favor of bill-and-keep.

B. The Commission has authority to adopt measures encouraging states to move towards bill-and-keep for intrastate access traffic.

The Tenth Circuit recently held that, under sections 254(b)(3) and (b)(5), the Commission has not just an opportunity but an "obligat[ion]" to induce the states – by "carrot or . . . stick" – to do their part in ensuring comparable rates within their states.[22] The logic of the Tenth Circuit's ruling strongly indicates that the Commission has a more general authority to give the states appropriate inducements to make the transition from irrational, implicit funding mechanisms to the rational, explicit mechanisms required by section 254 Indeed, the very cornerstone of section 254 is the principle that, on both the interstate and the intrastate sides of the ledger, universal service should be funded not by ILECs alone through geographic rate-averaging and other implicit subsidies, but by "[a]ll

[22] *Qwest **Corp.** v FCC*, 258 F 3d 1191, 1204 (10th Cir. 2001) (internal quotation marks omitted)

providers of telecommunications services" through "equitable and nondiscriminatory contribution[s]" to explicit subsidy mechanisms.[23] Just as the Commission must "develop mechanisms to induce adequate state action" to fulfill the comparable-rate objectives of subsections 254(b)(3) and (b)(5),[24] so too must the Commission adopt mechanisms to induce state compliance with the core objective of subsections 254(b)(4), (e), and (f): a comprehensive transition by the FCC and the states to explicit, competitively neutral universal service programs.

Qwest therefore agrees with SBC (Comments 33-43) that the Commission can and should condition receipt of federal universal service funding on a state's willingness, over time, to remove all implicit subsidies from its intrastate access charges and to convert them into explicit intrastate funding mechanisms. That carrot is likely to be highly effective, since the federal fund will play a critical new role in replacing the implicit subsidies that section 254(g) now produces under the existing access charge regime and that the adoption of bill-and-keep would sensibly eliminate. Once the states transition away from those implicit subsidies, any residual attraction of retaining the existing intrastate access charge regime would be highly attenuated, because that regime could no longer be used as a competitively skewed source of funding for universal service. The way would then be cleared for the Commission to lead a national regulatory consensus in support of bill-and-keep

Finally, even if some states were reluctant to adopt bill-and-keep, such that conventional access charges accompanied intrastate but not interstate access traffic, that

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[23] 47 **U.S.C.** § 254(b)(4); *see also* 47 **U.S.C.** §§ 254(e) & **(f)**.

[24] *Qwest Corp.*, 258 F 3d at 1204.

reluctance would increasingly lead carriers to route traffic through digital networks (such as the Internet) in which "the interstate and intrastate components [of the traffic] cannot be reliably separated" – and that are thus categorically subject to the Commission's section 201 authority to impose bill-and-keep. ***See ISP Reciprocal Compensation Order*** ¶ **52.** As discussed in Qwest's opening comments (at **46-47**), and as also observed by SBC (Comments **42-43**), that inevitable consequence of digital technology would make alternatives to bill-and-keep unsustainable in any jurisdiction over the long term

CONCLUSION

For the reasons set forth here and in Qwest's opening comments, the Commission should adopt bill-and-keep for all traffic to the fullest extent of its jurisdiction.

Respectfully submitted,

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